(4)

Supreme Court, U.S.
FILED
APR 30 1992
OFFICE OF THE CLERK

No. 91-1555

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

---

**NATIONAL ADVERTISING COMPANY,**
*Petitioner,*
*vs.*
**CITY OF RALEIGH, NORTH CAROLINA,**
*Respondent.*

---

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

## PETITIONER'S REPLY BRIEF

---

**MICHAEL M. BERGER**
*Counsel of Record*
**RICHARD D. NORTON**
**of BERGER & NORTON**
1620 26th Street, Suite 200 South
Santa Monica, California 90404
(310) 449-1000

*Attorneys for Petitioner*
NATIONAL ADVERTISING COMPANY

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

No. 91-1555

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL ADVERTISING COMPANY,
*Petitioner,*
*vs.*
CITY OF RALEIGH, NORTH CAROLINA,
*Respondent.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## PETITIONER'S REPLY BRIEF

MICHAEL M. BERGER
*Counsel of Record*
RICHARD D. NORTON
of BERGER & NORTON
1620 26th Street, Suite 200 South
Santa Monica, California 90404
(310) 449-1000

*Attorneys for Petitioner*
NATIONAL ADVERTISING COMPANY

# TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

INTRODUCTION 1

I. IT IS NO PRECEDENT THAT OTHER PROPERTY OWNERS HAVE LITIGATED PREMATURELY 4

II. HYPOTHETICAL INJURY CANNOT GIVE RISE TO A CAUSE OF ACTION 5

III. SOME CONSTITUTIONAL RIGHTS ARE NOT "BETTER" THAN OTHERS 8

CONCLUSION 10

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Agins v. City of Tiburon<br>447 U.S. 255 (1980) | 6 |
| First English Evangelical Lutheran<br>Church v. County of Los Angeles<br>482 U.S. 304 (1987) | 9 |
| Hodel v. Virginia Surface Min. &<br>Recl. Assn.<br>452 U.S. 264 (1981) | 3, 4, 10 |
| Keystone Bituminous Coal Assn.<br>v. DeBenedictis<br>480 U.S. 470 (1987) | 3, 4, 10 |
| Kirby Forest Indus., Inc. v. U.S.<br>467 U.S. 1 (1984) | 6 |
| Long Beach Equities, Inc. v.<br>County of Ventura, no. 91-1076 | 3 |
| Lynch v. Household Fin. Corp.<br>405 U.S. 538 (1972) | 8 |
| Penn Central Transp. Co. v.<br>City of New York<br>438 U.S. 104 (1978) | 6 |
| Pennell v. City of San Jose<br>485 U.S. 1 (1988) | 3, 4, 10 |
| Zilber v. Town of Moraga,<br>692 F. Supp. 1195 (N.D. Cal. 1988) | 2 |

Page

**United States Constitution**

First Amendment 8
Fifth Amendment 8

**Publications**

Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 Hofstra Prop. L. J. 73 (1988) 3, 4

Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zoning & Planning Law Report 49 (July-Aug. 1988) 3

No. 91-1555

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

NATIONAL ADVERTISING COMPANY,
*Petitioner,*
*vs.*
CITY OF RALEIGH, NORTH CAROLINA,
*Respondent.*

---

# PETITIONER'S REPLY BRIEF

---

## INTRODUCTION

If Raleigh is serious about the arguments which appear in its Brief in Opposition, then Raleigh is litigating a different case than this one.

First. In a purported effort to correct "misstatements of fact," Raleigh asserts that the issues presented by National Advertising Company "do not fairly represent the *factual findings* of the lower court." (Opp. ii; emphasis added.) Later in the brief, Raleigh amplifies that thought by noting that "[w]hat Petitioner disagrees with is *the court of appeals' findings of fact* [*sic*] . . . ." (Opp. 12; emphasis added.)

Raleigh is right about one thing: National vehemently "disagrees with . . . the court of appeals' findings of fact . . . ." The Court of Appeals had no business making

"findings of fact." Indeed, because this case never went to trial, and was decided on a motion for summary judgment, *no court* made any actual findings of fact. Nonetheless, the Court of Appeals acted as though central "facts" had been proved and were not subject to dispute.

That usurpation of the function of a trial level finder of fact is one of the complaints that National has about the Court of Appeals' decision.

Second. A second supposed "misstatement of fact" was whether Raleigh told National to remove *all* of its signs, including those on federal highways. Raleigh suggests not. (Opp. ii) Whether Raleigh now likes it or not, the letter it sent to National, as alleged in the complaint, described and identified *each* of National's signs (including those on federal highways) and demanded their removal.

Third. Raleigh says that the case law on "ripeness" is clear and there is no confusion which would benefit from this Court's ministrations. (Opp. 4)

If Raleigh believes that, it is both fortunate and lonely. No one else believes it.

- The lower courts, which struggle daily with the manifold permutations of the "ripeness" rules, and have termed them "harsh," "counterintuitive," and "oxymoronic" don't believe it.[1]
- The commentators who see courts groping for answers but failing to

---

[1] *Zilber v. Town of Moraga*, 692 F. Supp. 1195, 1199 (N.D. Cal. 1988).

come up with any "predictable approach" don't believe it.[2]

- The 94% of property owners who see their suits dismissed because they are held to be premature and unripe don't believe it.[3]
- Those who repeatedly beseech this Court for further guidance don't believe it.[4]

The opinion below has the potential for further destabilizing this field of the law by approving (indeed, demanding) action which this Court and all others have rejected: filing suit to challenge a land use regulation *as soon as* the regulation is adopted and *before* the regulation inflicts objective harm. If that is the scenario this Court desires, then that message should come from this Court directly, as it is contrary to the message this Court has consistently given that suit must await patient ripening. (*Hodel v. Virginia Surface Min. & Recl. Assn.*, 452 U.S. 264, 293-297 [1981]; *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 494-495 [1987]; *Pennell v. City of San Jose*, 485 U.S. 1, 10 [1988])

---

[2] Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zoning & Planning Law Report 49, 53 (July-Aug. 1988).

[3] The statistical analysis is contained in Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 Hofstra Prop. L. J. 73, 91 (1988).

[4] Illustrative is the Petition for Writ of Certiorari now pending in *Long Beach Equities, Inc. v. County of Ventura*, no. 91-1076.

## I.

## IT IS NO PRECEDENT THAT OTHER PROPERTY OWNERS HAVE LITIGATED PREMATURELY

Raleigh tries to divert attention from the legal issue before this Court by asserting that the case must have been ripe when the ordinance was adopted because other property owners have sued shortly after the adoption of regulations and courts in those cases did not hold that the cases were premature. (Opp. 4)

Each part of this analysis is faulty.

First. The fact that property owners filed suit is obviously of no legal moment. (It is hardly revealed wisdom that anyone with a typewriter and a filing fee can "file" suit.) Property owners understandably get upset when ordinances or regulations that *might* affect them are enacted, whether immediately or in the future. Often, they sue immediately. That is what three groups of property owners did in this Court's most extensive ripeness decisions: *Pennell*, *Keystone*, and *Virginia Surface Mining*. In each case, this Court held that the property owner had jumped the gun and sued prematurely. Other cases in which property owners have been held to have sued before their cases had ripened are legion. The fact that courthouse steps are littered with the remains of prematurely litigating property owners proves nothing.

Second. The fact that some courts (in fact, as Blaesser points out [2 Hofstra Prop. L. J. at 91], a small minority) have entertained suits is likewise of no moment *unless* those courts considered the ripeness issue and held that the cases were ripe. The elementary precept that a decision is authority only for issues raised and decided needs no citation of authority. Thus, the

cases cited by Raleigh which supposedly prove that billboard "amortization" ordinances have repeatedly been "found" ripe for litigation immediately after adoption (Opp. 4) are irrelevant here. In *none* of those cases was the ripeness issue litigated. For whatever reason, the government entities and courts were content to litigate the merits without raising the ripeness issue.

Thus, the vehicle which Raleigh has constructed to carry its argument is incapable of bearing its intended legal freight. Neither the actions of those property owners with a tendency to lunge toward the courthouse at the first hint of a regulatory disagreement nor those courts that have dealt with the merits of some cases *without discussing or deciding whether the cases were ripe or not*, can determine the outcome here. This case will stand or fall on its own merits.

## II.

## HYPOTHETICAL INJURY CANNOT GIVE RISE TO A CAUSE OF ACTION

Raleigh has tried to paint the decision below as a narrow one, tailored to the facts of this case, which can have no broad impact. (Opp. 2-3)

Wrong.

Raleigh's analysis is tied to the "findings of fact" which Raleigh believes the Court of Appeals made in this case. (Opp. ii, 12) It is only by *assuming* that damage instantly occurred (as the Court of Appeals did, *without evidence*, in this appeal from a summary judgment) that one can conclude that the statute of limitations either started to run or expired.

To justify its conclusion, the Court of Appeals **hypothesized** that, on the date the Raleigh ordinance was enacted, it reduced the value of National's property and made that property less attractive to prospective purchasers. (App. A, p. 8) This hypethesis is the fulcrum on which the Court of Appeals' statute of limitations analysis rests. There are *two fundamental errors* in that hypethesis, both discussed in the Petition for Writ of Certiorari and both ignored by Raleigh:

- *First.* This Court has expressly held that merely reducing the value of property and making property less attractive to potential purchasers does *not* state a claim for a taking. (*Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 131 [1978]; *Kirby Forest Indus., Inc. v. U.S.*, 467 U.S. 1, 15 [1984])

  Using economic analysis to find a taking requires a *deprivation of all economically viable use.* (*Agins v. City of Tiburon*, 447 U.S. 255, 260 [1980]) Plainly, that did not occur here when the ordinance was adopted.

- *Second.* The analysis this Court requires in regulatory taking cases is NOT the analysis used by people in the real estate market. In the real world of buyers and sellers, all regulatory enactments are immediately factored into the price a piece of property can command. For example, when a city re-zones vacant land from its former availability for a high-rise office building to make it useable only

for a single family residence with a large yard, buyers in the market would react and offer less to purchase the property. However, until someone actually attempted to develop the property and could prove that this Court's multi-pronged test for a taking had been met, no cause of action would exist.[5]

If not reversed by this Court, the analysis of the Court of Appeals would justify — and probably require — the filing of suit in *all* regulatory impact cases immediately. The risk of waiting to "ripen" the situation — *i.e.*, dismissal of suit, as National suffered here — is too great.

---

[5] Raleigh's conclusory assertion that "a cause of action arose" when the ordinance changed the status of the signs (Opp., p. 14) begs the question and ignores the Court of Appeals' opinion. The Court of Appeals repeatedly *refused* to conclude that a cause of action *for a taking* had arisen in 1983 or at all. (App. A, pp. 6, fn. 3, 8) Even if Raleigh were correct, and *some* cause of action arose in 1983, the issue here is whether a cause of action *for a taking* arose then so that the statute of limitations for that *specific* cause of action could have run. Raleigh's assertion provides no analysis and no answer.

## III.

## SOME CONSTITUTIONAL RIGHTS ARE NOT "BETTER" THAN OTHERS

Plainly, the Court of Appeals treated a challenge on First Amendment grounds differently from a challenge on Fifth Amendment grounds for statute of limitations purposes. And when it applied the statute of limitations to the Fifth Amendment challenge, the Court of Appeals deliberately created conflict with the 9th Circuit Court of Appeals on what limitation period to apply.

Raleigh's attempted defense of the Court of Appeals won't wash.

First. Raleigh asserts that the Court of Appeals didn't *hold* that no limitation period applies to a First Amendment challenge. (Opp., p. 6)

Wrong.

However one wants to characterize it, the Court of Appeals dealt with the *merits* of the First Amendment challenge and expressly refused to consider it barred by the passage of time. (App. A, p. 16) If it had applied the statute of limitations (as the District Court did), it could not have reached the merits.

Second. Raleigh then asserts that, even if the Court of Appeals treated the First and Fifth Amendments differently, that's OK, because the First Amendment "has always enjoyed a high position in [the] hierarchy . . . ." (Opp., p. 6)

"High" it may be, and deservedly so, but the protection of the rights of property owners against State action is linked in the Fourteenth Amendment with the rights to life and liberty. (*See also Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 [1972].) Trying to "rank"

constitutionally protected rights would seem to be a futile exercise. The issue here is whether violation of the Constitution can be validated by the mere passage of time. And, if so, whether some parts of the Constitution are immune from that sanction. No good reason has been presented for the distinction.

Third. Raleigh asserts that there are no causes of action directly under the Constitution. In Raleigh's words, ". . . *the Constitution* tells us how to compensate for a taking, it *does not* conceal a separate grant of jurisdiction or *create a separate cause of action* outside of some statutory scheme for enforcement." (Opp., p. 8; emphasis added.)

Wrong again.

As this Court recently expressed it:

> "We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of ' "the *self-executing* character of the constitutional provision with respect to compensation . . . ." ' [Citations.] . . . . [I]t has been established at least since *Jacobs v. United States*, 290 U.S. 13 (1933), that claims for just compensation are *grounded in the Constitution* itself . . . ." (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 [1987]; emphasis added.)

Whether a statute of limitations can apply to constitutional violations at all and, if so, which statute, are questions which are confused, rather than answered by the decision below. Without this Court's intervention, that confusion will surely multiply.

## CONCLUSION

Notwithstanding Raleigh's comfort level with the existing legal situation, the law of "ripeness" in regulatory taking cases is chaotic. The number of Petitions which this Court examines which raise that issue are testimony to the breadth of the problem.

Perhaps this Court thought it had provided sufficient guidance in *Virginia Surface Mining*, *Keystone*, and *Pennell*. Decisions like the one below demonstrate that confusion continues to reign. The lower courts will flounder and create additional conflict and confusion until this Court acts.

National Advertising Company prays that this Court's writ issue so that rationality can be brought to this area of the law and the time of courts and litigants can be spent evaluating the merits of their cases.

Respectfully submitted,

MICHAEL M. BERGER
*Counsel of Record*

RICHARD D. NORTON

of BERGER & NORTON

*Attorneys for Petitioner*
NATIONAL ADVERTISING
COMPANY